Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. 85-481

IN THE SUPREME COURT OF THE UNITED STATES

Term, 1985

LEWIS C. STANLEY, Petitioner,

v.

JOHN AUBERT, JOAN AUBERT AND SINKERS, INC.,
Respondents

BRIEF IN OPPOSITION

John Aubert and Joan Aubert, Pro Se
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Skillman, NJ 08558
609/466-1826

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MISCELLANEOUS

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PROCEDURAL HISTORY

On April 29, 1981, Plaintiffs commenced a Replevin Action in the Law Division, Somerset County, to recover possession of certain computer floppy disks from Defendants and for damages. On the same date, the Court entered an Order to Show Cause, with Temporary Restraints, as to why the Plaintiffs should not be entitled to immediate possession of the computer disks. On May 5, 1981, the return date, the Court entered an Order granting immediate possession of the disks to Plaintiff, John Aubert, and ordered Plaintiffs to account for all monies received from a certain contract between Plaintiff, Sinkers, Inc. and

Merrill, Lynch, Pierce, Fenner & Smith, pending trial of the case. The Court adjourned certain motions made by Defendants and cross motions of Plaintiffs to May 22, 1981.

On May 22, 1981, the Court considered Defendant's motions to:

(1) strike New Horizons as a Plaintiff;

(2) sever all claims against Defendant Stanley;

(3) transfer claims to the Chancery Division;

(4) direct Plaintiffs to deposit monies in Court, inter alia;

and Plaintiffs' motions to:

(1) quash Defendants Notice in Lieu of Subpoena; and

(2) to require Lewis C. Stanley to relieve himself as legal counsel.

The Court denied Defendants' motions on the grounds that Defendants had failed to file an Answer to the Complaint and were therefore premature. Judge Gaynor also denied Plaintiffs' motion to require Lewis C. Stanley to relieve himself as counsel on the grounds that his previous representation of both parties did not afford him undue advantage or result in breach of

confidentiality, but left the matter open for reconsideration.

The Court entered an Order to Show Cause, returnable July 2, 1981, as to why the Plaintiffs should not be held in contempt for failure to provide monthly accountings.

On June 29, 1981, Plaintiffs filed a Notice of Motion returnable July 2, 1981, to enter Default against Defendants for failure to file an Answer. On June 20, 1981, Plaintiffs abandoned their Notice of Motion and filed a Stipulation of Dismissal, without prejudice, pursuant to Rule 4:37-1. The Court considered the Order

to Show Cause and effect of the voluntary dismissal on July 2, 1981, and determined that Plaintiffs had accounted pursuant to the Order and dismissed the Order to Show Cause. The Court further ruled that the dismissal would be rescinded if the Defendants filed answering pleadings within 10 days.

Defendants filed Answers and Counterclaims alleging, inter alia, breach of fiduciary obligations by Plaintiff, within the 10 day period. Defendants also requested reconsideration of their prior motions returnable July 31, 1981.

The Court in a letter opinion dated July

27, 1981, denied Defendants renewed motions on the grounds that voluntary dismissal of the Complaint rendered the issues moot and ruled that it would be appropriate to transfer the case to the Chancery Division.

The Court reconsidered the same motions on September 25, 1981 and rendered a letter opinion dated October 29, 1981 and entered an Order dated October 29, 1981, which provided, in part, that the case be transferred to the Chancery Division and that Plaintiffs be permitted to file an Answer to Defendants' Counterclaims and assert any Counterclaims against Defendants' Counterclaims.

On November 18, 1981, Plaintiffs filed an Answer to the Counterclaim and asserted additional claims against Defendants (also thereby refiling the original allegations of the Complaint), plus additional causes of action:

(1) for denying Plaintiffs access to the premises of GM Printing where the computer was housed;

(2) seeking damages against Defendants for their use of the computer without compensation to New Horizons;

(3) to compel Defendants to account for their use of the computer;

(4) seeking damages against Defendant Stanley for breach of his obligations to his former clients and for negligence in his representation of his former clients, inter alia.

On October 23, 1981, Plaintiffs filed a separate action in the Chancery Division (Docket No. C 704-81) for dissolution of New Horizons Business Systems, Inc. and other relief.

Defendants filed motions in Chancery returnable December 4, 1981 for:

(1) a declaratory judgment requiring Plaintiffs to bring all present and

future business opportunities to New Horizons, inter alia;

(2) to produce certain discovery;

(3) to hold Plaintiffs in contempt;

(4) to require Plaintiffs to deposit all monies in Court, inter alia.

Plaintiffs filed a cross motion to require Defendant Stanley to relieve himself as legal counsel, inter alia.

On December 4, 1981, Judge Drier denied Defendants' motions, except to fix a discovery schedule. The Court granted Plaintiffs' motion to require Stanley to relieve himself as counsel.

Defendants filed a motion returnable December 18, 1981, asking the Court to reconsider its rulings of December 4th and other relief. Plaintiffs filed a cross motion to dismiss Defendant Stanley's counterclaim for malicious prosecution. The motions were adjourned to January 8, 1982.

The Court entered an order filed January 27, 1982:

(1) consolidating docket numbers C-788-81 and C-704-81;

(2) changing its decision of December 4, 1981, and permitting Defendant Stanley to remain as legal counsel, but reserving further decision on

the matter if circumstances warranted;

(3) dismissing Defendant Stanley's counterclaim for malicious prosecution;

(4) making New Horizons a nominal party to the litigation without representation by attorney or receiver;

(5) ordering discovery to proceed as outlined in the Order, and

(6) denying all other motions.

On February 11, 1982, the deposition of Plaintiff Joan Aubert was taken by the Defendants and the deposition of

Defendant Grace McMahon was scheduled to be taken February 16, 1982.

On February 16, 1982, Defendants submitted an Order to Show Cause for partial summary judgment and declaratory judgment. This request was denied by the Court. Defendants' request for a stay pending leave to appeal was also denied.

On February 17, 1982, the Appellate Division entered a stay of proceedings pending the outcome of Defendants' notice of motion for leave to appeal.

Plaintiffs filed a cross motion for leave to appeal.

Both motions for leave to appeal were denied.

The Court entered a pre-trial order filed October 6, 1982.

Defendants filed a notice of motion returnable December 17, 1982, to sever certain claims and transfer them to the Law Division. This motion was denied.

Defendants filed a motion returnable February 14, 1983 (the trial date) to require Judge Drier to disqualify himself. The motion was denied.

Plaintiffs submitted an expert report within the time provided by the pre-trial order.

Defendants filed a motion for leave to appeal Judge Drier's Order denying Defendants' motion for disqualification of the trial judge. This motion was denied. Defendants' sought leave to appeal this denial in the Supreme Court of New Jersey. Docket No 21,195. Defendants' application for leave to appeal was denied.

On September 27, 1983, Plaintiffs made a pre-trial motion to disqualify Defendant Lewis C. Stanley from being attorney for the Defendants. The Court granted such motion for reasons expressed on the record in open court and in a supplemental written opinion. An Order

was entered on November 2, 1983, ordering Lewis C. Stanley to deliver a substitution of attorney forthwith. A second Order was entered to sever the claims against Defendant Stanley for separate trial by jury (consented to by counsel on the record). Defendants then sought reconsideration of the disqualification issue in a new motion dated November 30, 1983. Defendants' motion was denied in an Order dated January 10, 1984.

On or about January 13, 1984, Defendants filed a Notice of Appeal and Notice of Motion for Leave to Appeal Judge Long's denial of the reconsideration. Defendants' request for a stay of proceedings.

pending the appeal was denied by Judge Long.

On February 7, 1984, the Appellate Division denied Defendants' motion for leave to appeal and for a stay, and dismissed Defendants' appeal. Thereafter, also on February 7, Justice Handler of the Supreme Court also denied Defendants' request for a stay.

On May 30, 1985, The Supreme Court of New Jersey denied Petitioner Stanley's Petition for Certification and dismissed Petitioner's appeal.

STATEMENT OF FACTS

In December of 1979 and January of 1980, Respondents John Aubert and Joan Aubert and Appellants Grace McMahon and George McMahon had discussions relating to the joint purchase of a computer.

On or about January 26, 1980, the Auberts and McMahons purchased a computer and related equipment for the approximate sum of $11,660.00. As a down payment on account of the purchase price, the Auberts paid the sum of $3,886.67, and one week later the McMahons paid an equal sum of $3,886.67, each from their own personal funds.

On or about February 4, 1980, Appellant

Lewis C. Stanley, drafted and filed a Certificate of Incorporation under the name of New Horizons Business Systems, Inc. with Lewis C. Stanley as the sole incorporator. There were to be four participants in the corporation; Jerry McMahon, Grace McMahon, John Aubert and Joan Aubert. Stanley did not review the Certificate of Incorporation or discuss the purposes of the corporation with the Auberts at any time. The purposes expressed in the Certificate were based on conclusions of Stanley from meetings or conversations with Grace and Jerry McMahon. Stanley released the filed Certificate of Incorporation and a blank corporate kit

with stock to the McMahons some time on or before April 4, 1980, without reviewing anything with the Auberts. Stanley did know that Joan Aubert was to be President of the Corporation. Stanley concluded there was no reason to discuss potential conflicts with the Auberts.

The first corporate meeting took place on April 4, 1980, in a relaxed atmosphere at the offices of Appellant GM Printing Services. The incorporator and attorney, Appellant Stanley, did not attend the meeting. The corporate minute book was partially filled out at the meeting. No stock of New Horizons was issued.

Prior to the first corporate meeting on April 4, 1980, the Auberts and McMahons, trading as New Horizons, accepted a purchase order from Janney Montgomery Scott, a securities brokerage firm (hereinafter referred to as J.M.S.). The purchase order required New Horizons to typeset (using the computer) certain data on sinking fund bonds, which data was to be supplied by J.M.S. Appellant GM Printing Services also accepted a purchse order from J.M.S. to print and bind copies of the data in a cover, after it had been typeset by New Horizons. In exchange for these services, New Horizons was to receive

the sum of $6,500.00 and GM Printing was to receive the sum of $5,300.00. The project for J.M.S. was completed before April 4, 1980, the date of the first corporate meeting. Throughout the above period of time and continuing through January 7, 1981, Respondent John Aubert was continuously employed full-time by J.M.S. and Appellants the McMahons were employed by and owned GM Printing.

The Auberts and McMahons initially agreed that the computer would be located in the business premises of GM Printing. Respondents' understanding was that the computer would be available to both Respondents and Appellants for

their own interests, either business or recreational. In addition, it was anticipated that New Horizons might generate additional income by having the computer located in the print shop. The New Horizons portion of the J.M.S. project was completed almost entirely through the evening and weekend efforts of the Auberts, with little or no assistance from the McMahons. The actual printing of copies and covers to the book was done by GM Printing, for which it was separately paid. The J.M.S. book was copyrighted by J.M.S.

The net proceeds of the J.M.S. project payable to New Horizons were then used

to pay off the one-third balance owing on the computer and related equipment.

After April 4, 1980, Respondents Aubert and Appellants McMahons continued to share the use of the computer. Among other things, the McMahons used the computer for video games and other personal uses without compensating New Horizons. Except for the additional sum of $680.00 paid by J.M.S. for cross - tabulation of bonds, no additional revenue was received by New Horizons. In October of 1980, Respondent John Aubert contemplated leaving his employment with J.M.S. to become a consultant in the field of

corporate sinking fund bonds. Primarily for liability reasons, Respondent Aubert formed Sinkers, Inc., a New Jersey corporation, on October 22, 1980, which entity would perform the consulting services. In addition, Sinkers, Inc. commenced negotiations to purchase the rights to another bond data book known as the Stuart Brothers Book. Negotiations to obtain the rights to said book were unsuccessful. Respondent Aubert, in addition to his consulting work, decided to publish his own book on sinking fund bonds to be known as "The Sinker Book", the data for which would be researched, accumulated, compiled and verified through public sources of information, including original

source documents. Respondent Aubert terminated his employment with J.M.S. effective January 7, 1981. In order to assist in the preparation of the Sinker Book, Respondents used the computer.

On April 1, 1981, Sinkers, Inc. entered into a contract with Merrill, Lynch, Pierce, Fenner & Smith, Inc. to perform consulting services for Merrill Lynch and to publish a bond data book to be known as "The Sinker Book", and market the book through Merrill Lynch. As compensation, Sinkers was to be paid a base consulting fee of $70,000.00 per annum, and in addition, would be paid the sum of $500.00 for each book sold through Merrill Lynch. The Sinker Book

was copyrighted by Sinkers, Inc.

In January of 1981, Appellant George McMahon approached Respondent John Aubert about dissolving the New Horizons corporation. Because of Respondents' need for computer equipment on a regular basis, Respondents offered to purchase Appellant McMahons' interest in the computer and related equipment. On February 26, 1981, Auberts and McMahons met in the presence of an accountant at which time it was verbally agreed that Auberts would purchase the McMahons' interest. Appellant George McMahon verbally agreed to the sum of $5,000.00 on or about the evening of April 8, 1981.

Unexpectedly on April 21, 1981, Appellant Lewis C. Stanley, without the consent or permission of Respondents, removed twenty (20) magnetic floppy disks labelled "Sinkers, Inc." and "Aubert" from the computer area in the premises of GM Printing, and refused to return the magnetic disks unless Respondents paid Appellants fifty percent (50%) of the proceeds of the Merrill Lynch contract. The next day, Appellants McMahon changed the locks on the GM Printing premises, thereby denying access to Respondents. By Notice dated April 24, 1981, Joan Aubert, the President of New Horizons Business Systems, Inc. delivered a

notice to Appellants directing them to order Lewis C. Stanley to return all computer disks to Joan Aubert immediately. Appellants refused to return the property of Respondents and litigation was commenced in order to obtain possession of the property.

REASONS FOR DENYING THE PETITION

ARGUMENT I

PETITIONER LEWIS C. STANLEY IS NOT THE REAL PARTY IN INTEREST AS REQUIRED BY RULE 17(a) OF THE RULES OF CIVIL PROCEDURE, AND MAY NOT PROSECUTE THIS ACTION ON BEHALF OF THE MCMAHONS.

Rule 17(a) provides: Every action shall be prosecuted in the name of the real party in interest. Generally a "real party in interest" is "... the party who, by the substantive law, has the right sought to be enforced ...", Lubbock Feed Lots, Inc. v. Iowa Beef Processors, 630 F.2d 250 at 257 (5th Cir. 1980). The purpose of Rule 17(a) is to bring before the Court the party rightfully interested in the outcome of the litigation, so that decisions will

be binding and conclusive and repetitive and vexatious litigation may be avoided. Petitioner must demonstrate that on this appeal he is the "real party in interest". Therefore, he must show that he is seeking to enforce his right or rights. Petitioner fails to do this. Petitioner admittedly represents only himself on this appeal, and yet the only right sought to be enforced is the McMahon's right to counsel. Petitioner, clearly, is not the "real party in interest" on this appeal as required by Rule 17(a).

It is important to note, at this point, that Petitioner's only rights on this appeal are those inherent to counsel who

has been disqualified. Although Petitioner was originally a party defendant to this action, all counts as to Petitioner were severed and transferred, with consent of Petitioner, to the Law Division for jury trial. (P117-18a) [Respondents' "P" citations refer to Appendix submitted by Petitioner.] These counts were tried to a jury which found Petitioner guilty of conversion and awarded damages to Respondents. Petitioner does not seek, however, by this petition, to appeal from the jury trial. Instead, Petitioner seeks to appeal his disqualification as counsel for the McMahons. While Petitioner would be within his rights to appeal the jury

verdict against him, he has no right to appeal his disqualification as counsel. Petitioner has not cited, nor has research revealed, any case law or autnority recognizing any right in the disqualified attorney to appeal his disqualification. Such a right belongs solely to his client. As this Court has consistently held, a party "... has standing to seek redress for injuries done to him, but may not seek redress for injuries done to others." Moose Lodge No. 107 v. Irvis, 407 U.S. 163 at 166-67, 92 S.Ct. 1965 at 1968, 32 L.Ed.2d 627 at 634 (1972). E.g., Linda R.S. v. Richard D., 410 U.S. 614 at 617, 93 S.Ct. 1146 at 1148, 35 L.Ed.2d

536 at 540 (1973), Virginian R. Co. v. System Federation No. 40, 300 U.S. 515 at 558, 57 S.Ct. 592 at 604, 81 L.Ed. 789 (1937). If the McMahons believe that their rights have been violated as a result of Petitioner's disqualification, it is they who should appeal and with separate counsel. It should be noted that the McMahons have never appealed Petitioner's disqualification, and that the time for such an appeal has since lapsed.

It is also apparent that Petitioner's attempt to raise the McMahon's right to counsel on this appeal violates the orders of the courts below. By asserting the McMahons' rights exclusively,

Petitioner is, in effect, acting as the McMahons legal counsel. Every court that has ruled on this matter has precluded Petitioner from assuming that role. This appeal is simply another violation of these orders. To permit Petitioner to appeal as, in effect, the McMahons legal counsel, would condone his repeated violations of the lower court orders. This Court should not tolerate Petitioner's conduct, and should dismiss this petition.

In summary, Petitioner has failed to demonstrate that he is the "real party in interest" entitled to bring this appeal as required by Rule 17(a). Petitioner has not demonstrated that it

is his right or rights that he is seeking to enforce. In fact, the only right raised by Petitioner is the McMahons' right to counsel. This right may be enforced by the McMahons but not by Petitioner. Petitioner is not the "real party in interest" as required by Rule 17(a), and his appeal should be dismissed.

ARGUMENT II

THE PETITION SHOULD BE DENIED AS THE CASE IS NOW MOOT.

As a general rule, a writ of certiorari

will be granted only where some useful purpose may be accomplished; it will not lie where operation of the writ would be useless, unavailing, futile, or would accomplish nothing, or amount to no more that an idle gesture. 14 Am. Jur. 2d Certiorari Sec.8 (1957). It is Respondents contention that any decision in this matter, even if it grants Petitioner the relief he requests, would be "no more than an idle gesture".

Petitioner seeks to be reinstated as legal counsel for the McMahons and represent the McMahons against the Respondents. The McMahon's claims against the Respondents, as explained more fully in the Statement of Facts,

involve the corporation New Horizons. These are the only claims involved. These claims were, however, dismissed, with prejudice, by the trial court by the order dated April 24, 1984. (P131a) The McMahons have never appealed nor have they preserved their right to appeal the dismissal of these claims. As a result, the time for appeal has lapsed, and these claims no longer exist. Consequently, any decision, even if Petitioner prevails on this appeal, would accomplish nothing. Petitioner can not represent the McMahons against the Respondents if the McMahons do not have any claims against the Respondents. As noted above, any claims that they had

against the Respondents expired when the McMahons failed to appeal. These claims will not be revived even if Petitioner succeeds on this appeal. It is, therefore, unnecessary for this Court to consider Petitioner's appeal, and the petition should be dismissed as moot.

ARGUMENT III

PETITIONER LEWIS C. STANLEY WAS PROPERLY DISQUALIFIED FROM ACTING AS LEGAL COUNSEL FOR THE MCMAHONS.

Petitioner Lewis C. Stanley was disqualified from acting as legal counsel for George and Grace McMahon in

the instant matter for the reasons expressed in Judge Long's Letter Opinion of November 3, 1984 (P107a). This opinion has been affirmed by the Appellate Division (P53a) and the Supreme Court of New Jersey. (P1a)

The first ground for disqualification was the conflict of interest inherent in Petitioner's representation of the McMahons against his former clients, Respondents; the subject matter of this litigation being the very subject of his prior representation. The case law and the codes of professional responsibility support the lower courts' decisions. ABA Model Rule 1.9 clearly states, "A lawyer who has formerly represented a client

in a matter shall not thereafter: (a) Represent another person in the same or substantially related matter in which that person's interests are materially adverse to the former client, unless this former client consents after consultation." This prohibition against a lawyer's representation of interests adverse to a former client is echoed in a majority of the circuits of this country. As the 9th Circuit held in Trust Corp. of Montana v. Piper Aircraft, 701 F2d 85 at 87 (1983), "... a lawyer may not represent an adversary of his former client if the subject matter of the two representations is 'substantially related', which means: If

a lawyer could have obtained confidential information in this first representation that would have been relevant in the second." E.g., In Re Corn Derivatives Anti-Trust Litigation, 748 F2d 157 at 161 (3rd Cir. 1984), Kevlik v. Goldstein, 724 F2d 844 at 851 (1st Cir. 1984), Analytica, Inc. v. NDP Reseach, 708 F2d 1263 at 1266 (7th Cir. 1983), State of Ark. v. Dean Foods Products Co., Inc., 605 F.2d 380 at 383,384-85 (8th Cir. 1978), In Re Yarn Processing Patent Validity Litigation, 530 F2d 83 at 89 (5th Cir. 1976), Redd v. Shell Oil Company, 518 F.2d 311 at 315 (10th Cir. 1975), T.C. & Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp.265 (S.D.N.Y. 1953).

Petitioner's actions in this case clearly fall within the prohibition of the Model Rules and the case law. This litigation involves a dispute between the McMahons and the Respondents as to whether a business opportunity undertaken by Respondents with Merrill Lynch belonged to New Horizons Corporation. The dispute focused on what the purposes of the corporation were to be, and what the intentions of the parties were in forming the corporation. Petitioner acted as the sole incorporator and drafted the Articles of Incorporation. Petitioner has now undertaken to represent the McMahons against his former clients the

Respondents in exchange for a substantial contingency fee based upon the outcome of this litigation. Clearly, Petitioner's representation of the McMahons is adverse to the interests of his former clients, Respondents. It is also obvious that the subject matter of the representations are substantially related, indeed the subject matter is the same. The facts of this case show not only an appearance of impropriety, but a substantial and direct conflict of interest which clearly mandates disqualification. Given these facts, the lower courts properly disqualified Petitioner. Petitioner argues that his

disqualification as counsel was improper as it was based solely on an appearance of impropriety. This argument is, however, without merit. As noted above, the facts in this case show a substantial and direct conflict of interest which clearly mandates Petitioner's disqualification. Further, the courts have long held that, in cases involving a lawyer's representation of interests adverse to former clients, an appearance of impropriety is adequate grounds to disqualify an attorney. The courts do not require that any actual conflict exist. As the court held in Richardson v. Hamilton International Corp., 489 F.2d 1382 at 1385-86 (3rd Cir. 1972),

cert.den., 411 U.S. 986, 93 S.Ct. 2271, 36 L.Ed.2d 964 (1973), "This means that a court may disqualify an attorney for not only acting improperly, but also for failing to avoid the appearance of impropriety." E.g,., Gas-A-Tron of Arizona v. Union Oil Co. of California, 534 F.2d 1322 at 1324-25 (9th ir. 1976), In Re Coordinated Pretrial Proceedings, Etc., 658 F.2d 1355 at 1360 (9th Cir. 1981), Dutton v. County of Suffolk, 729 F.2d 903 at 908 (2nd Cir. 1984), In Re Corn Derivatives AntiTrust Litigation, 748 F.2d 157 at 161-62 (3rd Cir. 1984), T.C. & Theatre Corp. v. Warner Bros. Pictures, 113 F.Supp. 265 at 268-69 (S.D.N.Y. 1953).

Further, the lower courts concluded, and a review of the evidence clearly indicates, Petitioner should be a witness in this case. Petitioner's appearance as both counsel and witness is a clear violation of ABA Model Code DR5-101 and ABA model Rule 3.7. This finding clearly supports the lower court's disqualification of Petitioner as counsel for the McMahons.

Finally, Petitioner has not put forth any evidence which demonstrates that the McMahons suffered any hardship due to Petitioners disqualification. There is no financial evidence to show that the McMahons could not have afforded

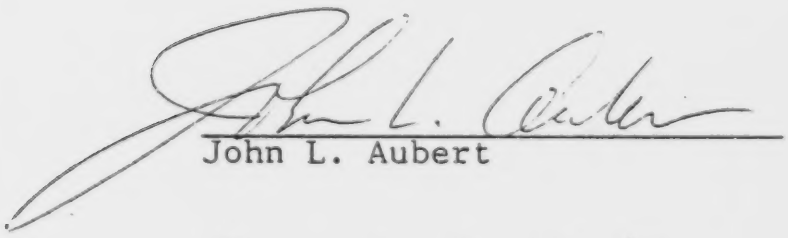
new counsel if they had desired to proceed with this matter. In fact, the McMahons are the owners of a business, which was described by Petitioner as "their small, successful printing business." (P139a) The McMahons' failure to obtain substitute counsel was their own choice, not due to any hardship.

In summary, the Petitioner has failed to demonstrate that his disqualification as counsel was in any way improper. The lower courts applied the correct standards of law; and the findings of fact, which are entitled to great weight, clearly support the conclusion that Petitioner Stanley should be disqualified.

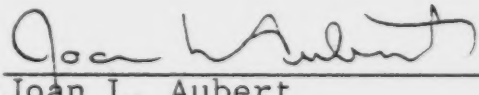
CONCLUSION

For the reasons stated above, it is respectfully requested that this Court dismiss the petition for writ of certiorari. Repondents also request that the Court award Respondents reasonable costs and damages as provided by 28 U.S.C. 1912.

Respectfully Submitted,



John L. Aubert



Joan L. Aubert

ober 18, 1985